***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

ORIGINAL

# 75-7134

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

B P/S

CLIFFORD J. LEWIS, JR.,

*Plaintiff-Appellant,*

*against*

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLIAM WIRTZ, as Trustees in Reorganization of the Properties of PENN CENTRAL TRANSPORTATION COMPANY, Debtor in Reorganization,

*Defendants-Appellees.*

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF DEFENDANTS-APPELLEES

ROBERT M. PEET
*Attorney for Defendants-Appellees*
466 Lexington Avenue
New York, N.Y. 10017
Tel. No. 340-2504

UNITED STATES COURT OF APPEALS
FILED
JUL 31 1975

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

**Cases:**

PAGE



**Statutes and Rules:**

# United States Court of Appeals
## FOR THE SECOND CIRCUIT

75-7134

---

CLIFFORD J. LEWIS, JR.,

*Plaintiff-Appellant,*

*against*

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLIAM WIRTZ, as Trustees in Reorganization of the Properties of PENN CENTRAL TRANSPORTATION COMPANY, Debtor in Reorganization,

*Defendants-Appellees.*

---

## BRIEF OF DEFENDANTS-APPELLEES

---

### Facts

Plaintiff's statement of the facts ignores the effects of the verdict in favor of defendants and omits many significant facts which support the jury's verdict.

Plaintiff was seen by several psychiatrists when he was around 10 or 12 years old (A-69). He had a nervous breakdown for six months starting in February of 1964 and was confined to a state psychiatric hospital (A-61-62). He was suffering from the paranoid schizophrenia which appeared again after his injury of October 26, 1969 (A-70-74). None of this was revealed to defendants when he applied for employment and was accepted in April of 1969 (Ex. A, Ex. C).

A person with this mental condition has delusions or hallucinations, misinterprets reality, lacks confidence, exercises poor judgment, makes excuses for his failures, finds untrue explanations for his inadequacies in order to justify his actions, and is apt to panic under stress (A-72-79). Because of his condition he worked intermittently and never held a job for long (A-70).

What actually happened on October 26, 1969 was that plaintiff, after releasing the trip handle to take the brakes off at the top of the hill, forgot to reset the trip handle by turning it back to the position it must be in before his turning the brake wheel will permit the winding up of the brake chain (A-116-118). Consequently, the brakes did not apply (because they couldn't until he reset the trip handle), he panicked, failed to check why the brakes weren't applying, and jumped off. Later, he sought to justify his actions by falsely blaming the brakes rather than himself.

Plaintiff's own testimony describing his testing of the brakes was that at the top of the hill he applied the brakes, heard the brake chain slack come up, kicked the chain a couple of times to see if it was real firm, heard the sliding wheels screech as the cars were pushed by the engine while the brakes were on, wound them on real tight, knew they were on and were working fine, then released them (A-33-36, A-52-55).

The examination of the brakes made by two qualified men four hours after the accident showed the brake chain to be of proper length and in good condition, the brakes to be in good condition, no standard safety device to be defective, and the car all right for service (Ex. I).

## POINT I

**The reports admitted into evidence were properly received as business records under either federal or state statutes.**

Rule 43(a) of the Federal Rules of Civil Procedure allows evidence to be admitted under state or federal law, whichever "favors the reception of the evidence".

These reports were admissible under both New York and federal statutes controlling the admission of business records.

New York's business record statute is CPLR 4518(a), which provides:

> "Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind."

Trainmaster Talbott, who was in charge of the yard where plaintiff was hurt, testified that he was required to make out reports of injuries as part of the regular course of his business and that he had Exhibit H (a printed form) prepared under his supervision and signed by him in the regular course of his business (A-80-83).

Assistant General Foreman Halderman, who was in the Maintenance of Equipment Department in the yard where plaintiff was hurt, stated that after every injury he was required to inspect the equipment involved and to report the results of the inspection on a regular printed form, that it was a regular part of his business to make and keep records of inspection of equipment involved in personal injuries, that this was also required by the Interstate Commerce Commission, and that Exhibit I was such a record made in the regular course of business (A-104-106).

Under New York decisions interpreting its business records statute, it has been held reversible error to reject defendant's offer of its accident report of the event that brought about the injury or death sued for, and the fact thet such reports may be self-serving was declared to affect the weight to be given the report but not its admissibility.

*Bishin* v. *N. Y. Central R. Co.*, 20 AD 2d 921 (2nd Dept. 1964);
*Bromberg* v. *City of New York*, 25 AD 2d 885 (2nd Dept. 1966);
*Toll* v. *State of New York*, 32 AD 2d 47 (3rd Dept. 1969).

The Federal Business Records Act, 28 USC § 1732(a), provides in part:

> "In any court of the United States . . . any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter.

> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

The decisions of this Court have held admissible under this Act accident reports made and offered in evidence by defendants.

> *Taylor* v. *Baltimore & Ohio R. Co.*, 344 F 2d 281 (1965), cert. den. 382 US 831;
> *Gaussen* v. *United Fruit Co.*, 412 F 2d 72 (1969);
> *Keohane* v. *New York Central R. Co.*, 418 F 2d 478 (1969).

Defendants have also been allowed by this Court to offer in evidence their ships' logs of accidents.

> *Terrasi* v. *South Atlantic Lines*, 226 F 2d 823 (1955), cert. den. 350 US 988.

The fact that a business record may be self-serving has been held by this Court to be no ground for refusing its admission on behalf of the person so served.

> *United States* v. *Dawson*, 400 F 2d 194 (1968), cert. den. 393 US 1023.

This Court refuses to interpret the Federal Business Records Act in a "dryly technical way" and leaves it up to the trial court in its discretion to determine whether a particular accident report is trustworthy and should under the circumstances be admitted.

> *Puggioni* v. *Luckenbach SS Co.*, 286 F 2d 340 at 344 (1961);

*LeRoy* v. *Sabena Belgian World Airlines,* 344 F 2d 266 at 274 (1965), cert. den. 382 US 878.

The trial court in the case at bar has properly exercised its discretion in favor of admissibility.

Exhibit H contains nothing that favors either plaintiff's or defendants' version of the accident. It is a neutral document. It was needed in evidence solely because it gave the number of the car involved (PRR 112851) and the type of brake involved (Peacock). The man who got the information for the report, night trainmaster Campbell, who was on duty when the injury occurred and took plaintiff to the hospital and inspected the car, was in a position to get such data but at the time of trial was living in Virginia beyond the reach of subpoena and working for another railroad (A-85, 91-93). The car number could have been obtained from the switch list or in three or four other ways (A-89). The type of brake could have been learned when Campbell inspected the car four hours after the accident.

Exhibit I is even more trustworthy since if anything is found wrong on inspection it must be recorded and repaired not only because ICC rules require this but to prevent later injuries and to serve as a basis for biliing the car owner for the cost of the repairs.

Plaintiff's brief relies solely on *Palmer* v. *Hoffman,* 318 US 109 (1943). This case has been distinguished or cited in dissents much more than it has been followed. It is readily distinguishable on its facts from the case at bar. There, the author of the offered document was involved in the accident himself and was the very person later accused of negligence; the document was a statement not a report; and the trial court by excluding it in effect made a preliminary finding of untrustworthiness. Here the persons who signed the documents had no personal involvement in the accident and were not accused of fault or

negligence; the documents were reports required by the Interstate Commerce Commission, were needed in the conduct of the company's business in keeping accident records, preventing accidents and billing car owners for repairs, and were found by the trial court to be trustworthy by his admitting them in evidence.

## POINT II

**The trial court correctly charged the jury with respect to the evidence as to the good condition of the brakes before and after the accident.**

It is well established both in New York and federal law that evidence of the condition of an object (here the brakes) before and after an accident is admissible on the issue of what the condition of that object was at the time of the accident, since the prior or subsequent condition may be inferred or presumed by the trier of fact to continue forward or backward in the absence of proof of intervening change where in ordinary experience such continuity would be expected.

*Gernau* v. *Oceanic Steam Navigation Co.*, 50 NY St. Rep. 156, 21 NYS 371 (1893), aff'd 141 NY 588;
*Peil* v. *Reinhart*, 127 NY 381 (1891);
*Gray* v. *Siegel-Cooper Co.*, 187 NY 376 (1907);
*Mironchik* v. *Sagadahoc S.S. Corp.*, 255 NY 81 (1930);
*Simon* v. *Ora Realty Corp.*, 1 NY 2d 388 (1956);
*Larsen Baking Co.* v. *City of New York*, 30 AD 2d 400 (2nd Dept. 1968), aff'd 24 NY 2d 1036;
*United States* v. *Consolidated Laundries Corp.*, 291 F 2d 563 (2d Cir. 1960);
*Amalgamated Clothing Workers of America* v. *N.L.R.B.*, 345 F 2d 264 (2d Cir. 1965);

*Manning* v. *New York Telephone Co.*, 388 F 2d 910 (2nd Cir. 1968);
*Keohane* v. *New York Central R. Co., supra,* 418 F 2d 478 (2d Cir. 1969);
*McFarland* v. *Gregory,* 425 F 2d 443 (2nd Cir. 1970).

The trial court's charge on the subject was based on the law established in the above cases. Plaintiff's brief (first line on page 9) misquotes the charge by using the word "unexplainable" when the court said "explainable" (A-143). More important, plaintiff's brief ignores the fact that plaintiff's own testimony established that there was nothing wrong with the brakes and that they did not apply when he turned the brake wheel because he had not reset the trip handle, i.e., because they were not operated properly. Even without this explanation of what actually happened, the evidence was admissible on the issue of plaintiff's credibility and as to the condition of the brakes at the time of the accident when properly operated.

*Texas and Pacific Ry. Co.* v. *Griffith,* 265 F 2d 489 (5th Cir. 1959).

The evidence of the condition before or after is clearly relevant and may defeat plaintiff's action if the trier of fact believes it and infers continuance forward or back of the condition, but if the trier of fact believes plaintiff's testimony that the brake was operated properly but failed to apply, then it may infer that the brake was inefficient and it becomes immaterial at that point that its earlier and later condition was good, since it need only malfunction once to constitute a violation. This is what the trial court charged.

## POINT III

**The trial court properly charged the jury that plaintiff's admittedly untruthful statements might be considered on the issue of his credibility.**

Plaintiff knew when he filled out in his own handwriting the answers to the questions asked in Exhibit C, and signed his name at the bottom of the sheet, and certified "that I have reviewed the foregoing information supplied by me and that it is true and complete to the best of my knowledge" that he was not telling the truth (A-65-68). Specifically, he was hiding his past treatment and hospitalization for schizophrenia when he answered "No" to questions 36, 37, 38 and 39 and on the following page when he denied to the examining doctor "any serious illness, injury or operation in the past".

Exhibit A, which plaintiff signed with the same certification, has similar concealment in his denial of organic or other ailment and of inability in the past to hold a job because of medical reasons and in his refusal to volunteer "any information you consider important to the consideration of your application."

In view of the latitude a federal trial judge has to comment on evidence, it was entirely proper for the trial court to mention the fact that plaintiff admittedly did not answer certain questions truthfully and concealed his mental condition as bearing on the issue of his credibility. His credibility was very much at issue, especially as to how the accident happened.

There is no rule of evidence that admissions must be sworn to before they can be used, though the certification of their truth by plaintiff almost made them sworn statements and at least made them equivalent to affirmations.

## CONCLUSION

**The judgment in favor of defendants should be affirmed.**

Respectfully submitted,

ROBERT M. PEET
*Attorney for Defendants-Appellees*
466 Lexington Avenue
New York, N.Y. 10017
Tel. No. 340-2504

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 31st day of July 1975

Attorneys for APPELLANT

COPY RECEIVED
JURON AND MINZNER

JUL 31 1975 BY MAIL

ATTYS FOR Plaintiff